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**UNITED STATES DISTRICT COURT**  
**EASTERN DISTRICT OF PENNSYLVANIA**

IN RE: ASBESTOS PRODUCTS  
LIABILITY LITIGATION (NO. VI)

CHARLES AIKINS,

Plaintiffs,

v.

GENERAL ELECTRIC COMPANY, et  
al.,

Defendants.

MDL DOCKET NO. 875

Case No. 2:10-cv-64595-ER

**GENERAL DYNAMICS  
CORPORATION'S REPLY TO  
PLAINTIFFS' OPPOSITION TO MOTION  
FOR SUMMARY JUDGMENT**

Date: December 12, 2011

Time: 10:00 a.m.

Courtroom: Hon. Eduardo C. Robreno

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## I. ARGUMENT

## A. General Dynamics Is A Government Contractor

Despite plaintiff's near admission that military vessels cannot be built without a contract with the government, plaintiff nevertheless argues that General Dynamics is not entitled to raise the government contractor defense because no contract to construct these Navy vessels was submitted in the moving papers. That the vessels were built pursuant to contract is a fact that cannot reasonably be questioned and General Dynamics requests that the court take judicial notice that the vessels at issue were built and procured pursuant to contract with the United States government.<sup>1</sup> Indeed, no evidence is submitted by plaintiff to the contrary and General Dynamics submits that no such authority exists. A review of more than 200 years of jurisprudence is instructive.

The power of the United States of America to procure property for the United States Navy dates at least as far back as the Constitution itself. See, for example, United States Constitution, Article 1, Section 8: “The Congress shall have Power .... To provide and maintain a Navy.” As a sovereign entity, the United States of America has the inherent authority to contract to discharge governmental duties. United States v. Tingey, 30 U.S. 115 (1831) [“The United States have in his political capacity a right to enter into a contract, or to take a bond in cases not previously provided by law. It is an incident to the general right of sovereignty...”].

Given this power to contract, and prior to the strict statutory guidelines regarding government contracts discussed below, the United States entered into contracts for everything from rice (U.S. v. Standard Rice Co., 323 U.S. 106 (1944)), flour (U.S. v. Kansas Flour Mills, 314 U.S. 212 (1941)), dried eggs (Priebe & Sons v. U.S., 332 U.S. 407 (1947)), and mechanic's suits (U.S. v. Cowden Mfr., 312 U.S. 34 (1941)), to Navy vessels (U.S. v. Bethlehem Steel, 315 U.S. 289 (1942))<sup>2</sup>; U.S. v. Newport News Shipbuilding, 178 F. 194 (1910)).<sup>3</sup>

<sup>1</sup> Federal Rule of Evidence 201(b): “A judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned” and FRE 201(f): “Judicial notice may be taken at any stage of the proceeding.”

<sup>2</sup> See *id.* at 103 (noting that the court may be taken at any stage of the proceeding).

1       The federal common law relating to procurement that arose out of the Constitution is  
 2 voluminous, and the excruciating detail that goes into procuring a Navy vessel and other military  
 3 property was codified at least as early as the Armed Services Procurement Act of 1947  
 4 (“ASPA”), 10 U.S.C. 2302, et seq., and thereafter further refined in the Federal Property and  
 5 Administrative Services Act of 1949 (“FPASA”), 41 U.S.C. 251, et seq., the Competition in  
 6 Contracting Act (“CICA”), codified in various sections of Titles 10, 31, 40 and 41 of the United  
 7 States Code, and ultimately culminating in the current Federal Acquisition Regulations (“FAR”)  
 8 and the Defense Federal Acquisition Regulations (“DFAR”).<sup>4</sup>

9       To be more specific, 10 U.S.C. 2305 of the ASPA entitled “Contracts: planning,  
 10 solicitation, evaluation, and award procedures,” among numerous other sections, provides the  
 11 framework for the contracting process including: government issuance of needs, research and  
 12 specifications, (*Id.* at 2305(a)(1)(A)(i)-(iii)), solicitation of bids, (*Id.* at 2305(a)(2)), an evaluation  
 13 process, (*Id.* at 2305(b)), a review by the Secretary of Defense, (*Id.* at 2305(c)-(d)), and award of  
 14 the contract. *Id.* at 2305(b)(4)(C). The FPASA, 41 U.S.C. 251, et seq., then specifies the  
 15 contracting procedures for procuring property and services, including competition requirements  
 16 for solicitation of contracts, (*Id.* at 253), authority to enter into contracts, (*Id.* at 253l), and  
 17 contract requirements. *Id.* at 254. CICA added that government contracts awards require full and  
 18 open competition. See, for example, 10 USC 2304: “[c]ontracting officers shall promote and  
 19 provide for full and open competition in soliciting offers and awarding Government contracts.”  
 20 Parts 1-53 of FAR and the related DFAR Supplement to the FAR, supra, then combine the  
 21 collective contracting requirements developed throughout American history into an extensive set

22  
 23 contracts were negotiated and executed in 1917 and 1918, when Germany's destructive warfare against our ocean  
 24 shipping essential to the successful prosecution of the war made it necessary for the United States to build the  
 25 greatest possible number of ships in the shortest possible time. They are typical products of a system of procurement  
 26 heavily relied upon by the United States Shipping Board Emergency Fleet Corporation and other government  
 27 purchasing agencies at the time.” U.S. v. Bethlehem Steel, 315 U.S. 289, 292 (1942).

28<sup>3</sup> Wherein the Court of Appeal upheld trial court’s conclusion that the Navy is liable for additional costs related to  
 sea trials of the CHARLESTON not contemplated by the shipbuilder during the contracting phase. See, generally,  
U.S. v. Newport News Shipbuilding, 178 F. 194 (1910).

<sup>4</sup> Given that the contracting process consists of literally tens of thousands of pages of Code and regulations, for the  
 purposes of brevity and judicial economy only certain portions of these regulations will be discussed here. Defendant  
 is prepared to submit further briefing on this subject should the court desire.

1 of statutes that govern the government contracting process and acquisitions by the Department of  
 2 Defense.

3 The Declaration of Admiral Sargent, submitted with the moving papers, also goes into  
 4 incredible detail with regard to the procurement of these Navy vessels, including the contracting  
 5 phase. (Sargent Declaration, at Paragraph 23, et. seq.; See also, generally, the Declaration of  
 6 Admiral Horne, submitted with the moving papers).

7 Accordingly, it is indisputable that Navy vessels, including the ones at issue here, are now  
 8 and always have been built pursuant to contract with the United States of America. To  
 9 commission and obtain a Navy vessel absent a contract would exceed the powers given the  
 10 government by the Constitution and would be a plain violation of hundreds of years of federal  
 11 common law and strict statutory guidelines.

12 Turning Plaintiff's argument on its head, if General Dynamics is not a government  
 13 contractor, the natural consequence is that General Dynamics did not build the vessel that  
 14 Plaintiff boarded since such construction could not have occurred and the claims fail. As the  
 15 Navy's procurement of these Navy vessels is not in dispute, General Dynamics is entitled to raise  
 16 the government contractor defense.

17 **B. Navy Vessels are Military Equipment**

18 Plaintiff asserts the vessels manufactured by General Dynamics are not military  
 19 equipment. Plaintiff argues that there is no evidence regarding the procurement of said vessels by  
 20 the military, or that the vessels were designed with specific consideration for a military purpose.  
 21 Instead, Plaintiff maintains that General Dynamics "products" were first produced for and sold to  
 22 the general market and that only incidentally did its products fit government specifications. (See  
 23 Plaintiff's Memorandum in Opposition, Section B(2), pp. 16:10-22:20).

24 Contrary to these allegations, military warships are military equipment and members of  
 25 the general public are not able to purchase combat-ready military vessels at the local market. As  
 26 stated in Defendant's moving papers, the case of In re: Hawaii Federal Asbestos Cases, 920 F. 2d  
 27 806 (9th Cir. 1992) is inapplicable to the matter herein for the obvious and indisputable reason  
 28 that military warships like the ones at issue herein are not commercially available products.

1     Indeed, pursuant to the International Traffic in Arms Regulations, 22 CFR 121.1 ("The United  
 2     States Munitions List"), the vessels at issue are designated by the United States government as  
 3     Defense Articles and "Significant Military Equipment" (Category VI(a), "Vessels of War"). By  
 4     his very nature, the vessels cannot be sold to the public and private ownership of these Defense  
 5     Articles would lead to very serious consequences to the owner. Pursuant to the International  
 6     Trafficking in Arms Regulations, and the government's own designation of these ships as  
 7     Military Equipment therein, General Dynamics requests that the Court take judicial notice that the  
 8     vessels at issue are in fact military equipment. FRE 201(b).

9                 As already demonstrated in the moving papers, the reason that the product manufacturers  
 10    at issue in In re Hawaii, supra, were not allowed to raise the government contractor defense is  
 11    because their products are available on the open market and do not involve the reasoned judgment  
 12    of the Navy in the design process. Specifically, the court found that the products "have not been  
 13    developed on the basis of involved judgments made by the military but in response to the broader  
 14    needs and desires of end-users in the private sector." Id. at 811.

15                 Again, a private consumer cannot purchase a Navy warship. The needs of "end-users in  
 16    the private sector" are not a concern when the Navy issues detailed specifications that private  
 17    shipyards, including General Dynamics, are required to follow. General Dynamic's sole  
 18    customer -- the United States Navy -- is intimately involved in and directs judgments related to  
 19    the construction and repair of its nuclear submarines and these judgments are made because the  
 20    Navy must ensure that combat-ready vessels are at all times protecting our borders.

21                 More recently, in Getz v. Boeing, CCH Prod. Liab. Rep. P18, 681; 2011 U.S. App. LEXIS  
 22    15877 (2011), the court of appeal expressly rejected plaintiffs' argument that the government  
 23    contractor defense was unavailable pursuant to In re: Hawaii because the government did not  
 24    forbid warnings. Getz, CCH Prod. Liabl. Rep. at p. 32; 322011 U.S. App. Lexis 158777. "To read  
 25    these cases as limiting preemption to those instances where the government forbids additional  
 26    warnings would be inconsistent with the Court's decision in *Boyle*." Id. See also In Re: Hawaii,  
 27    960 F.2d at 813 and Butler v. Ingalls Shipbuilding, Inc., 89 F.3d 582, 585 (9<sup>th</sup> Cir. 1996).

28                 Moreover, despite mere allegations to the contrary, Defendant has submitted an

1 abundance of evidence regarding the procurement of its vessels by the United States Navy. The  
 2 declaration of Admiral Sargent provides a detailed explanation regarding the design, construction  
 3 and procurement of Navy warships, including the use of military specifications. (See Exhibit E to  
 4 the O'Brien Decl., at ¶¶ 17-35). Plaintiff, on the other hand, has not produced any evidence to  
 5 support the contention that the vessels herein are not military equipment or that they were first  
 6 produced for and sold to the general market. Similarly, there is no evidence regarding Plaintiff's  
 7 alleged exposure to any other product for which Defendant can be held liable other than the  
 8 vessels at issue herein. As such, Plaintiff's assertion that Defendant's vessels are not military  
 9 equipment fails.

10 **C. A Significant and Irreconcilable Conflict with State Law Exists Herein**

11 Plaintiff avers that there is no evidence that General Dynamics was explicitly told or  
 12 instructed by the United States Navy not to warn of asbestos. Plaintiff also asserts that the  
 13 Uniform Labeling Act is evidence that they Navy required Defendant to place warnings on its  
 14 products. Plaintiff's argument is misleading, without any foundation and simply ignores the  
 15 evidence before the court.

16           1. *General Dynamics Built the Navy Vessels Pursuant to Contract*

17 Preliminarily, and as discussed above, all Navy vessels, including the ones at issue here,  
 18 are now and always have been built pursuant to contract with the United States of America.  
 19 Furthermore, the documents and contracts regarding the construction of the vessels at issue herein  
 20 are controlled by various federal statutes and Defendant is subject to strict government  
 21 regulations regarding the disclosure of the information contained in the documents. However,  
 22 Defendant has offered the testimony of its experts Admirals Horne and Sargent as evidence of the  
 23 Navy's requirements and instructions regarding the design and construction of the vessels,  
 24 including the use of warnings. (See Exhibits D and E to the O'Brien Decl.)

25           2. *A Conflict Exists Between General Dynamics' Obligation to Build  
                  Vessels Precisely to Government Specifications and a State Law Duty  
                  That Would Require Deviation from the Specifications*

27           The appellate court in Tate v. Boeing Helicopters, 55 F.3d 1150 (6th Cir. 1995), created  
 28

1 an alternative test to Boyle when applying the government contractor defense in the context of  
 2 state-based failure to warn claims: “When state law would otherwise impose liability for a failure  
 3 to warn of dangers in using military equipment, that law is displaced if the contractor can show:  
 4 (1) the United States exercised its discretion and approved the warnings, if any; (2) the contractor  
 5 provided warnings that conformed to the approved warnings; and (3) the contractor warned the  
 6 United States of the dangers in the equipment’s use about which the contractor knew, but the  
 7 United States did not.” Id. at 1157.

8 Relying on the case of Dorse v. Eagle-Picher Indus., Inc., 898 F.2d 1487 (11th Cir. 1990),  
 9 Plaintiff avers that Defendant has not presented evidence that there was a government directive  
 10 specifically prohibiting a warning from being placed on Defendant’s vessels regarding the  
 11 hazards of asbestos, and as such, Defendants could have issued a warning regarding the hazards  
 12 of asbestos. Accordingly, Plaintiff asserts that Defendant is not entitled to the government  
 13 contractor defense to his failure to warn claims. However, Plaintiff’s argument in this regard  
 14 fails.

15 First, Plaintiff’s reliance on the Dorse case is misplaced. As correctly noted by this court  
 16 in the matter of Faddish v. General Electric Co., 2010 WL 4146108 (E.D.Pa.), the “standard  
 17 articulated by the Eleventh District in Dorse has been rejected by every Circuit court to consider  
 18 the issue, as well as district courts in this circuit.” Instead, a government contractor is not  
 19 required to show an express government prohibition on warnings, but rather, must establish that  
 20 the US Navy exercised its discretion regarding warnings on Defendant’s ships. Id. at 9; see also,  
 21 Oliver v. Oshkosh Truck Corp., 96 F.3d 992, 1003 (7th Cir. 1996), cert. denied 520 U.S. 1116,  
 22 117 S.Ct. 1246, 137 L.Ed.2d 328 (1997).

23 Moreover, Defendant has established that the government exercised its discretion  
 24 regarding the use of warnings in the construction of Navy nuclear vessels. For example, Admiral  
 25 Sargent has testified that the technical specifications referenced in the procurement documents for  
 26 equipment have, since at least the 1940s, included detailed requirements regarding all written  
 27 materials supplied with equipment supplied to the Navy. Defendant has shown that the applicable  
 28 specifications included strict instructions regarding the labeling of and packaging of the

1 components themselves, and for all technical documentation that was procured with them. The  
2 Navy had precise specifications as to the nature of any markings, communication or directions  
3 affixed to or made a part of any equipment supplied by Original Equipment Manufacturers  
4 (OEMs) for ultimate use aboard Navy ships. OEMs, would not have been permitted, under the  
5 specifications, associated regulations and procedures, nor under the actual practice as it evolved  
6 in the field, to vary or to deviate in any respect from the Navy specifications in supplying  
7 equipment, including affixing any type of warning or caution statement to equipment intended for  
8 installation in a Navy ship, beyond those specifically required by the Navy without prior  
9 discussion and express approval by the Navy. (See Exhibit E to the O'Brien Decl., at ¶¶ 47-48).

10 Further, Admiral Sargent's affidavit outlines how Navy personnel participated intimately  
11 in the preparation and review of instruction books and technical manuals in a standardized format  
12 used by the Navy. These manuals included safety information to the extent – and only to the  
13 extent – directed by the Navy. Admiral Sargent further explains how manufacturers of  
14 components and equipment were not permitted, under the specifications, associated regulations  
15 and procedures, nor under the actual practice as it evolved in the field, to include any type of  
16 warning or caution statement in instruction books or technical manuals, beyond those required  
17 and approved by the Navy without prior discussion and approval by the Navy. The Navy  
18 dictated, reviewed and approved the contents of all technical manuals, including any cautionary  
19 language or emphasis. The Navy approached this process for review and approval of technical  
20 manuals in an exacting manner. It often created lengthy memoranda detailing word-by-word line  
21 edits to the content of technical manuals submitted for approval, including the wording of  
22 instructional material and warnings. The reasons for the Navy's detailed control over and review  
23 and approval of all written communication regarding equipment it procured was to ensure  
24 consistency of that information with the overall goals and priorities of the Navy in its operations.  
25 (See Exhibit E to the O'Brien Decl., at ¶¶ 49-51).

26 Admirals Sargent and Horne further explained how uniformity and standardization of any  
27 communication, particularly safety information, are critical to the operation of the Navy and Navy  
28 ship and that the Navy could simply not operate safely and effectively if personnel were trained

1 differently, using inconsistent information received from different manufacturers. If every  
2 equipment, structural steel and pipe manufacturer were allowed to decide on the need for, and  
3 provide its own safety and health warnings (including those concerning asbestos insulation that  
4 might be used on or around its product), inconsistent warnings would certainly have resulted. If  
5 each were to warn about all the possible substances that might be used on or around its  
6 equipment, sailors would quickly become inundated with inconsistent information on a myriad of  
7 substances. Therefore, the Navy's detailed specification of what warnings were required, both on  
8 equipments and in technical documentation, was logical and necessary. The Navy would not  
9 have permitted equipment suppliers to place asbestos-related warnings on packaging or containers  
10 for equipment or related parts or items supplied during the 1940s through at least the 1970s.  
11 Similarly, the Navy would not have permitted equipment suppliers to place asbestos-related  
12 warnings in any literature or documentations supplied with equipment for Navy ships in the  
13 1940s through the 1970s.

14 No private contractor, such as Defendant, could have affixed a written warning anywhere  
15 aboard an active duty naval warship during its construction or repair, advising the risk of asbestos  
16 exposure. To do so without the Navy's express approval would be a deviation from the detailed  
17 and specific instructions mandated by the Navy. The Navy's detailed specifications did not leave  
18 room for individual vendors to make determinations about inclusion of asbestos warnings. (See  
19 Exhibit E to the O'Brien Decl., at ¶¶ 51-53).

20 Plaintiff has produced no evidence to support his mere allegations to the contrary.  
21 Plaintiff, as the non-moving party, may not merely rely on allegations in his own pleadings, and  
22 rather must, by affidavits or as otherwise provided by the Rules of Civil Procedure, set out  
23 specific facts showing a genuine issue for trial. See Fed. R. Civ. P. 56 (e)(2). Plaintiff clearly has  
24 not submitted any affidavits or other evidence to contradict the testimony of Admirals Sargent  
25 and Horne, and Plaintiff will never be able to do so.

26 Defendant herein has established that the United States Navy exercised its discretion  
27 regarding warnings that could and could not be placed on products it procured from outside  
28 contractors. The affidavits of Defendant's experts accurately recite the process by which the

1 United States Navy controlled every detail in the construction of its warships through the use of  
 2 precise specifications, including specifications governing the placement of warnings on the  
 3 products it procured from outside contractors. Both Admirals Horne and Sargent have explained  
 4 that outside contractors were required to exactly adhere to the Navy's precise specifications about  
 5 warnings, and were not permitted to place any warning on its product, including a warning  
 6 regarding asbestos, without the Navy's express permission. As stated, Plaintiff will never be able  
 7 to produce any evidence to the contrary as his allegation that government contractors such as  
 8 Defendant herein could have placed warning on its vessels regarding the hazards of asbestos is  
 9 simply false.

10       D.     **The Boyle Elements are Met Because General Dynamics has Demonstrated that**  
 11       **Any Work That Was Performed To A General Dynamics' Ship Was Performed**  
 12       **Pursuant to Reasonable Precise Specifications, The Work Conformed to Those**  
 13       **Specifications, and the Navy was Aware of Asbestos Hazards Prior to 1969.**

14           In its underlying motion for summary judgment, General Dynamics established that : 1)  
 15       All work performed aboard vessels built by General Dynamics for delivery to the United States  
 16       Navy was done pursuant to comprehensive plans, specifications and requirements issued by the  
 17       government, and Navy officers insured that the shipbuilding conformed to those specifications  
 18       and requirements so as to ensured that the ships are reliable and combat ready and to protect lives.  
 19       (See Exhibit D to the O'Brien Decl. at ¶¶ 12-18); 2) To ensure readiness for combat, the Navy  
 20       cannot tolerate deviations from specifications. (*Id.*); 3) Any work performed by General  
 21       Dynamics had to comply with these specifications and conform to them. (*Id.*; see also Exhibit E  
 22       to the O'Brien Decl. at ¶¶ 54-65); and 4) the US Navy knew of health hazards associated with  
 23       asbestos in the 1960's and prior to the time that Decedent worked aboard ships allegedly  
 24       manufactured by General Dynamics. Numerous Navy documents concerning asbestos health  
 25       hazards existed at least as early as the 1960's and the subject was discussed at Navy meetings in  
 26       the early 1960's, which Admiral Horne has personal knowledge of. (See Exhibit D to O'Brien  
 27       Decl. at ¶¶ 24-28). These undisputed facts precisely meet the Supreme Court's interpretation of  
 28       the government contractor defense - namely, the Boyle elements are satisfied and the government  
 contractor defense is established as a matter of law.

1           Admiral Horne's and Admiral Sargent's testimony establishes that the United States  
 2 approved reasonably precise specifications for the construction and repair of its vessels. Plaintiffs  
 3 submit no evidence to oppose this testimony. Rather, Plaintiffs simply dismiss Admiral Horne's  
 4 declaration as generic. In fact, Admiral Horne's testimony in this case is that he has personal  
 5 knowledge that the United States Navy dictated every aspect of the design manufacture,  
 6 installation, overhaul, written documentations and warning associated with its ships, and that the  
 7 Navy did not permit any deviations from its contracts. (See Exhibit D to O'Brien Decl. at ¶5.)  
 8 Admiral Horne testified further that if any asbestos-containing products were used aboard the  
 9 ships built for the US Navy, their use was pursuant to and mandated by specific requirements of  
 10 the Navy. (Id. at ¶ 13.) Admiral Horne has a 35-year long career with the United States Navy; and  
 11 during this time he was responsible for maintaining naval ship military specifications and  
 12 monitoring compliance therewith. (Id. at ¶¶ 1, 3.) Admiral Horne is knowledgeable with respect  
 13 to the United States' approval of reasonably precise specifications for the construction and repair  
 14 of US naval vessels. Plaintiff's attempts at dismissing this expert's statements are hollow,  
 15 unsupported, speculative and should not be countenanced by the Court.

16           With respect to General Dynamics's conformance with the Navy's specifications, as noted  
 17 in General Dynamics's underlying papers, the government's acceptance and continued use of  
 18 equipment is itself enough to show that it conformed to government specifications. See Niemann  
 19 v. McDonnell Douglas Corp. (S.D. Ill 1989) 721 F. Supp. at 1027. Therefore, there is no question  
 20 of fact with respect to the United States approval of reasonably precise specifications for the  
 21 construction and repair of its naval vessels, and that General Dynamics's work at all times  
 22 conformed to those specifications.

23           E.     **General Dynamics had no Duty to Warn the Navy about the Hazards of Asbestos**  
 24           **that the Navy Already Knew of at the Time of the Exposure**

25           With respect to Boyle's third prong, General Dynamics has demonstrated that the U.S.  
 26 Navy was well aware of the hazards of asbestos during the time frame at issue herein. Plaintiffs'  
 27 opposition is based on the erroneous conclusion that General Dynamics knew about the hazards  
 28

1 of asbestos in the 1950's and therefore the Boyle defense is not available. This argument is  
 2 irrelevant and fails. Even if the court were to assume, *arguendo*, that General Dynamics had  
 3 superior knowledge to the Navy in the 1950's, which plaintiffs have produced no evidence of,  
 4 General Dynamics certainly did not have superior knowledge to the Navy as of 1969. As made  
 5 perfectly clear by Admiral Horne, the Navy was well aware of the hazards associated with the  
 6 inhalation of asbestos prior to 1969. When the government is ignorant of hazards associated with  
 7 work being performed pursuant to a government contract, Boyle and its progeny require that  
 8 those contracting with the government must warn of those hazards. Nowhere does Boyle require a  
 9 continuing obligation to warn the Navy of hazards after the Navy was aware of such hazards. No  
 10 case is found to suggest that the Navy must continually be reminded about that which it already  
 11 knows. Obviously the Supreme Court is not engaged in idle acts, yet plaintiffs' reading of the  
 12 government contractor defense would nevertheless render the Supreme Court's third element of  
 13 Boyle superfluous. Such a reading would require warning the government about every hazard in  
 14 every instance irrespective of whether the government was aware of the hazard at the time of the  
 15 incident.

16       The recent opinion by the Ninth Circuit in Getz v. Boeing, supra, is instructive. In that  
 17 case an Army Special Operations Chinook MH-47E helicopter crashed in Afghanistan, killing the  
 18 soldiers onboard. The cause of the crash was determined to be an engine flameout created by an  
 19 onboard computer system which controlled engine fuel flow. In affirming summary judgment in  
 20 favor of the helicopter manufacturer and the component part manufacturer on the government  
 21 contractor defense, the Court of Appeals found that the first two elements of Boyle were met and  
 22 then turned to the third element relating to knowledge of the hazard, wherein the court stated:  
 23 “[w]ith respect to the potential for water- or ice-induced flameout, it is clear that **the Army was**  
 24 **already aware of this particular risk.**” Getz, CCH Prod. Liabl. Rep. at p. 26 (emphasis added).  
 25 The court, then, upheld summary judgment as the defendants did not have a duty to warn of a risk  
 26 that the Army was already aware of. Id.

27       As made clear by the Court of Appeal in Getz, government contractors do not have an  
 28 obligation to warn the government when the government is aware of the particular hazard. Since

1 the Navy was aware of the hazards of asbestos prior to 1969, General Dynamics had no duty to  
 2 warn the Navy at the time of plaintiff's alleged exposure, so the third element of Boyle is met.

3       **F.     The Declarations of Plaintiff Charles Ay and Herman Brush Are Inadmissible**

4           In an attempt to create evidence where there is none, Plaintiffs submit the declaration of  
 5 Plaintiff Charles Aikins. Mr. Aikins, contrary to the evidence to date, now states that he was  
 6 exposed to asbestos aboard ships for which General Dynamics are allegedly responsible, namely  
 7 the FORT FUHER, the KANSAS CITY, the KILAUEA, and the WICHITA. However, Mr.  
 8 Aikin's was afforded the opportunity to offer his testimony with respect to these ships at his  
 9 deposition yet failed to do so. Instead, he offers a sham declaration, after the close of discovery,  
 10 contradicting his prior testimony so as to save his case from dismissal. Said practice is  
 11 prohibited. See e.g. Paul Oil v. Federated Mutual Ins. Co., 154 F.3d 1049 (9th Cir. 1998). As  
 12 such, Mr. Aikin's declaration should not be considered by the court, and, without any evidence of  
 13 exposure, Plaintiff's claims against General Dynamics should be dismissed. Such as finding  
 14 makes the declarations of Mr. Ay and Dr. Brusch inadmissible as irrelevant.

15           Furthermore, the declaration of Charles Ay is also inadmissible as it lacks foundation and  
 16 his opinions asserted therein are completely speculative; his statements that Plaintiff was exposed  
 17 to asbestos on ships for which General Dynamics are responsible are based entirely on  
 18 speculation, not evidence, and cannot be used to defeat General Dynamics motion. See Fed. R.  
 19 Evid. 403, 701. Specifically, Mr. Ay has no personal knowledge of any work performed by Mr.  
 20 Aikins with respect to a General Dynamics' ship. Indeed, Mr. Ay relies solely on the sham  
 21 declaration of Mr. Aikins alone in support of his opinion. There is no indication that Mr. Ay ever  
 22 read or considered Plaintiff's deposition testimony. Additionally, Mr. Ay did not observe any  
 23 work that Mr. Aikins performed. Furthermore, there is no foundation for any of Mr. Ay's  
 24 opinions regarding the repair and maintenance of naval vessels. Mr. Ay is a career insulator who  
 25 never ever served in the U.S. Navy, nonetheless has any experience similar to Mr. Aikins, but yet,  
 26 believes he is an expert on testifying about how Mr. Aikins could have been exposed to asbestos  
 27 asbestos. Mr. Ay is clearly not a naval expert or an industrial engineer. Therefore, any of his  
 28 opinions, such as his opinion that more likely than not, Mr. Aikins sustained exposure to asbestos

fibers as a result of his work aboard General Dynamics' ships are completely lacking in foundation and inadmissible.

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## II. CONCLUSION

General Dynamics has established all of the Boyle elements and plaintiffs have produced no evidence to the contrary. Plaintiffs' claims are barred as a matter of law and summary judgment should be entered in favor of General Dynamics.

Dated: November 21, 2011

JACKSON JENKINS RENSTROM LLP

By: /s/ James J. O'Brien  
JAMES J. O'BRIEN  
Attorneys for Defendant  
GENERAL DYNAMICS CORPORATION

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## **CERTIFICATE OF SERVICE**

The undersigned, counsel for GENERAL DYNAMICS CORPORATION, hereby certifies that a true and correct copy of the foregoing DEFENDANT GENERAL DYNAMICS CORPORATION'S REPLY TO PLAINTIFFS' OPPOSITION TO MOTION FOR SUMMARY JUDGMENT was filed with the Court electronically on November 21, 2011 and made available for viewing and downloading through the CM-ECF (Electronic Case Filing) system to all counsel of record who are registered to receive a Notice of Electronic Filing for this case. This document was served via United States Postal Service regular mail to those counsel of record not registered with CM-ECF on November 21, 2011.

/s/ *Keri A. Donohue*

Keri A. Donohue

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